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No. 05-1588

Supreme Court, U.S.
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In the Supreme Court of the United States

SAFEGUARD INTERNATIONAL FUND, L.P.,

Petitioner,

v.

IFC INTERCONSULT, AG,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In *Peacock* v. *Thomas*, 516 U.S. 349, 352 (1996), this Court "granted certiorari to determine whether the District Court had jurisdiction, and to resolve a conflict among the Courts of Appeals." The Court, as it does in a very high percentage of its opinions, identified the cases giving rise to the conflict it said it granted certiorari to *resolve*. *Id.* at 352 n.2. Among them were *Skevofilax* v. *Quigley*, 810 F.2d 378 (3d Cir.) (en banc), cert. denied, 481 U.S. 1029 (1987), supporting jurisdiction, and *Berry* v. *McLemore*, 795 F.2d 452 (5th Cir. 1986), holding that no jurisdiction exists. Even the panel below recognized that *Skevofilax* came out "on the wrong side of the circuit split." Pet. App. 17a.

Remarkably, however, IFC urges this Court to consider only "post-*Peacock* decision[s]" (Br. in Opp. 7, 19 n.7) – as if *Peacock* (which denied jurisdiction) had resolved the conflict by robbing jurisdiction-*denying* decisions like *Berry* of vitality and leaving jurisdiction-*granting* decisions like *Skevofilax* in place. IFC even claims that *Peacock* "resolved" the circuit split "*against Berry*." *Id.* at 20 n.8 (emphasis in original). The court below denigrated this Court's identification of the cases that gave rise to the circuit split the Court was resolving as "hardly a well-considered dictum" (Pet. App. 17a), but IFC goes a step further and suggests that this Court actually agreed with the decisions it identified as being on the wrong side of the circuit split and disagreed with the decisions it identified as being on the right side.

Unless this Court is prepared to join IFC in its bizarre reading of *Peacock*, there are only two possibilities. Either (1) the Court did resolve in *Peacock* the circuit split it said it was resolving, and the decision below – which openly follows *Skevofilax* and disagrees with *Berry*, which IFC makes no effort to

distinguish – should be summarily reversed, or (2) the Court, despite its best efforts, failed to resolve the circuit split it said it was resolving, and the issue remains at least as certworthy today as it was more than a decade ago when the Court granted certiorari in *Peacock* – more so, in light of *Hudson* v. *Coleman*, 347 F.3d 138 (6th Cir. 2003), a case IFC tries only weakly to distinguish, and *Yang* v. *City of Chicago*, 137 F.3d 522 (7th Cir. 1998), and other Seventh Circuit cases, which join the Third Circuit in refusing to believe that this Court really meant to reject the circuit precedents it said it granted certiorari in *Peacock* to assess.

Beyond those fundamental points, IFC's brief in opposition is thoroughly unpersuasive in its attempts to mischaracterize the Third Circuit's holding as limiting a district court's exercise of ancillary jurisdiction to garnishment actions in which the garnishment and the underlying action arise from a "common nucleus of operative fact"; in its confusion of two different types of ancillary jurisdiction (supplemental jurisdiction and ancillary enforcement jurisdiction); and in its minimization of the importance of this recurring issue of federal jurisdiction.

A. IFC's Reading Of The Decision Below Is Wrong

IFC's defense of the Third Circuit's opinion below relies on a fundamental mischaracterization of both that court's holding in this case and its decision in *Skevofilax*. IFC contends that "neither *Skevofilax* nor the decision here holds that Rule 69 creates federal jurisdiction over any and all garnishments." Br. in Opp. 9. Instead, IFC asserts, "[t]he Court of Appeals' holding, both in *Skevofilax* and here, is simply that a district court has jurisdiction over a garnishment based on an indemnification claim where that claim and the original claim arise out of a 'common nucleus of operative fact.'" Br. in Opp. 11; see also *id.* at 12 ("[T]he Court's routine, narrow holding is that jurisdiction exists over a garnishment where the garnishment and the underlying action arise from a common nucleus of operative fact.").

Neither of the Third Circuit's decisions is so limited, however. In *Skevofilax*, the court explicitly held that "the district court has ancillary jurisdiction to adjudicate a garnishment action by a judgment creditor against a nonparty to the original lawsuit which may owe the judgment debtor an obligation to indemnify against the judgment, or any other form of property." 810 F.2d at 385.[1] Contra *Peacock* v. *Thomas*, 516 U.S. at 357 ("We have never authorized the exercise of ancillary jurisdiction in a subsequent lawsuit to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment."). The Third Circuit in its opinion below nevertheless "h[e]ld that *Skevofilax* is still 'good law' and" that Third Circuit panels "are bound by this precedent to find that there is ancillary jurisdiction to impose an obligation to pay an existing judgment on a party that is alleged in good faith to be secondarily liable for that judgment." Pet. App. 28a-29a.

Thus, despite IFC's repeated characterizations to the contrary, the Third Circuit does not limit federal jurisdiction to those garnishment proceedings that share a "common nucleus of operative fact" with the earlier claim. Indeed, it is impossible to imagine a garnishment proceeding that would not be subject to ancillary jurisdiction under *Skevofilax* and the opinion below.

Furthermore, IFC struthiously pretends that the Third Circuit did not read *Peacock* to "except[] Rule 69 actions from its reach." Pet. App. 18a. It is no wonder that IFC is too embar-

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[1] Judge Becker's concurrence in *Skevofilax* criticized the majority for "appear[ing] to assume the broad proposition that a federal court has ancillary jurisdiction over any effort to enforce its judgment regardless of whether the adjudication of the defendant's claim for funds involves facts and defendants unrelated to the original dispute." 810 F.2d at 388 (Becker, J., concurring). Judge Becker went on to explain that "[t]he mere fact that federal courts normally have ancillary jurisdiction over garnishment proceedings does not demonstrate that they also have jurisdiction over disputed enforcement actions against third parties not present in the original action." *Ibid.*

rassed to admit that the Third Circuit said such a thing – IFC fully understands that "supposing Rule 69 itself to grant jurisdiction" would be wrong (Br. in Opp. 6) – but the Third Circuit's indefensible rationale is plain on the face of its opinion and will not go away just because IFC ignores it.

B. Ancillary Jurisdiction Cannot Exist Over A Subsequent Lawsuit With No Independent Basis For Jurisdiction

1. IFC's repeated (and mistaken) contention that the Third Circuit's reasoning rested on its determination that "the garnishment and the underlying federal action arose out of a common nucleus of operative fact," Br. in Opp. 5, overlooks the well-established legal principle that supplemental jurisdiction cannot exist over a *subsequent* lawsuit, regardless of whether those claims are alleged to be factually interdependent. As this Court explained in *Peacock*:

> In a subsequent lawsuit involving claims with no independent basis for jurisdiction, a federal court lacks the threshold jurisdictional power that exists when ancillary claims are asserted in the same proceeding as the claims conferring federal jurisdiction. Consequently, claims alleged to be factually interdependent with and, hence, ancillary to claims brought in an earlier federal lawsuit will not support federal jurisdiction over a subsequent lawsuit.

516 U.S. at 355. Here, as in *Peacock*, the district court had already entered judgment in the earlier district court proceeding when the subsequent action was brought. See Pet. App. 42a. "[O]nce judgment was entered in the original * * * suit, the ability to resolve simultaneously factually intertwined issues vanished." *Peacock*, 516 U.S. at 355. Thus, the Third Circuit's purported holding cannot be reconciled with this Court's precedents, regardless of whether the proceedings shared a "common nucleus of operative fact," because the garnishment proceeding was "a subsequent lawsuit to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment." *Peacock*, 516 U.S. at 357.

In addition to being completely irrelevant, IFC's argument that the garnishment proceeding is based on the same "common nucleus of operative fact" as the proceeding to confirm IFC's arbitration award is meritless. IFC contends that the Third Circuit's "careful" explanation of the "common nucleus of operative fact" between IFC's confirmation action against SIP and its garnishment action against the Fund is sufficient to establish ancillary jurisdiction. Br. in Opp. 6. The Third Circuit's explanation simply concludes that a "common nucleus of operative facts" existed between the proceedings

> because the original arbitration matter which the District Court confirmed dealt with IFC's contract with SIP to recruit investors *for the Fund*, which SIP managed via SIF Management, L.P. When SIP refused to pay the placement fees to IFC, it did so on the grounds that it was protecting the Fund from alleged fraud.

Pet. App. 28a. The court's explanation merely establishes that the underlying dispute involved a contract to which the Fund was the third-party beneficiary – the merits of the dispute did not involve the Fund. Similarly, the proceeding to confirm IFC's arbitration award involved neither the Fund nor the merits of the dispute between IFC and SIP; rather, the district court only reviewed the propriety of the arbitration procedures. See Pet. App. 10a. As we noted in the petition, the indemnification provision, which is the basis of IFC's action against the Fund, was not at issue in the proceeding to confirm IFC's arbitration award, nor was it even part of the record that was before the district court at the time. Pet. 15.[2] Because the claims "have

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[2] IFC argues that "the Fund forgets that it impliedly conceded that the garnishment was part of the same case or controversy as the arbitration when it sought to defend the garnishment by putting at issue the same defenses of fraud and breach of trust litigated in the arbitration." Br. in Opp. 10 n.5; see also *id.* 3-4. The Fund raised, as it is permitted to do under PA. R. CIV. P. 3145(3), a *counterclaim* (not a defense) regarding IFC's diversion of funds in its answer to IFC's interrogatories. The

little or no factual or logical interdependence, * * * no greater efficiencies would be created by the exercise of federal jurisdiction over them." *Peacock*, 516 U.S. at 356 (citing *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380 (1994)).

2. As we explained in the petition, the Third Circuit's holding that *all* Rule 69 garnishment actions are subject to ancillary jurisdiction, despite IFC's characterizations to the contrary, clearly contradicts this Court's precedents. IFC repeatedly points out (just as "vehemently" in this Court as it did in the district court, see Pet. App. 41a) that the Court stated in *Peacock* that it had approved the exercise of ancillary jurisdiction over garnishments. 516 U.S. at 357. But IFC joins the Third Circuit in completely ignoring the nuances of the Court's opinion. This Court stated in *Peacock* that it had "never authorized the exercise of ancillary jurisdiction in a subsequent lawsuit to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment.," *ibid*, and went on to warn that "we have cautioned against the exercise of jurisdiction over proceedings * * * where 'the relief [sought is] of a different kind or on a different principle' than that of the prior decree.'" *Id.* at 358.[3] Disregarding this Court's analysis in *Peacock*, the

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Fund's defenses in the garnishment action pertained only to the interpretation of the indemnification provision, which, as explained above, was neither before the district court in the confirmation proceeding nor in the record at that time. More important, IFC's argument misses the point. The Fund's counterclaim had no factual or logical interdependence with the district court proceeding to confirm the arbitration award, which is IFC's purported basis for ancillary jurisdiction.

[3] IFC contends that the Fund misstates the test for supplemental jurisdiction by arguing that IFC's garnishment action against the Fund seeks "relief * * * of a different kind or on a different principle" than the earlier district court proceeding. Br. in Opp. 16; see also Pet. 16. This Court, first in *Dugas* v. *American Surety Co. of New York*, 300 U.S. 414, 427 (1937), and then in *Peacock*, 511 U.S. at 358, explained that a district court, in exercising its ancillary enforcement jurisdiction, may adjudicate claims brought "in a federal court in aid of and to effectuate

Third Circuit's opinion authorized ancillary jurisdiction over IFC's garnishment action against the Fund, which sought to impose liability on the basis an entirely new theory of liability on a party that did not participate in the earlier proceeding.

C. IFC Is Unsuccessful In Its Efforts To Deny A Circuit Conflict

The Third Circuit's opinion, which finds arguable support in the Seventh Circuit, see *Yang* v. *City of Chicago*, 137 F.3d 522 (7th Cir. 1998), and *Wilson* v. *City of Chicago*, 120 F.3d 522 (7th Cir. 1998), is plainly in conflict with the Sixth Circuit's holding in *Hudson* v. *Coleman*, 347 F.3d 138 (6th Cir. 2003), and the Fifth Circuit's pre-*Peacock* holding in *Berry* v. *McLemore*, 795 F.2d 452 (5th Cir. 1986).

IFC disagrees and contends that there is "no conflict between the Third Circuit's opinion here and the Sixth Circuit's decision in *Hudson*." Br. in Opp. 20. IFC argues that the distinction the Third Circuit drew between the questions of law that were at issue in this case and the questions of fact supposedly at issue in *Hudson* supported the Third Circuit's holding that ancillary jurisdiction existed over the garnishment proceeding against the Fund. Br. in Opp. 21-22; see also Pet. App. 27a. Neither IFC nor the Third Circuit, however, has cited any authority for the proposition that ancillary jurisdiction exists to resolve questions of law in a situation in which it would not exist to resolve questions of fact.

More important, the Sixth Circuit in *Hudson* adhered to the principles articulated by this Court in *Peacock*, holding that ancillary jurisdiction did not exist over a garnishment action against a third party that was not a party to the consent judgment at issue in the earlier proceeding, on the basis of an indemnity

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its prior decree to the end either that the decree may be carried fully into execution or that it may be given to fuller effect, *but subject to the qualification that the relief be not of a different kind or a different principle*." *Dugas*, 300 U.S. at 427 (emphasis added).

agreement that was not relevant to, and had not been interpreted in, the earlier proceeding. 347 F.3d at 143. The Third Circuit explicitly disagreed with the Sixth Circuit's reading of *Peacock*, simply stating that "[w]e are unpersuaded by our brethren's analysis," Pet. App. 26a, and spurned the Sixth Circuit's opinion as resting on "a distinction without a difference." Pet. App. 27a. The Third Circuit's later claim that its "disagreement with *Hudson* is immaterial," *ibid.*, is wrong for reasons given in the petition (at 22-23) and nowhere answered by IFC.

IFC also unsuccessfully attempts to dismiss *Berry*, 795 F.2d at 452, a Fifth Circuit case that was cited favorably in *Peacock*. IFC contends that, "to the extent that *Peacock* * * * can be deemed to have resolved any circuit split relating to garnishment at all, it would have been resolved *against Berry*: *Peacock* makes clear that garnishments *can* fall within federal court jurisdiction." Br. in Opp. 20 n.8.

That argument is patently wrong, as shown not only by footnote 2 of *Peacock* but also by the Court's reasoning in *Peacock*. In *Berry*, the Fifth Circuit refused to exercise ancillary jurisdiction over "third parties, who were strangers to the court's judgment in *Berry I*." 795 F.2d at 455.[4] The Fifth Circuit foreshadowed this Court's reasoning in *Peacock* precisely. Compare *ibid.* ("We can find no case where a court held it had ancillary jurisdiction to consider claims in a new and independent action merely because the second action sought to satisfy or give additional meaning to an earlier judgment.") (emphasis deleted) with *Peacock*, 516 U.S. at 355 ("We have never authorized the exercise of ancillary jurisdiction in a subsequent lawsuit to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment."). The idea that *Berry* can be disregarded because *Peacock* abrogated it is fanciful, and rests on the notion that the label "garnishment" makes

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[4] The Fifth Circuit ultimately held that the district court had diversity jurisdiction over the garnishment proceeding against the insurer. *Berry*, 795 F.2d at 456.

all other principles stated in *Peacock* inapposite – the very premise the Third Circuit adopted (Pet. App. 18a ("*Peacock* excepted Rule 69 actions from its reach.")) but IFC cannot bring itself to defend (Br. in Opp. 5 ("The Third Circuit did not * * * hold that Rule 69 confers federal jurisdiction, nor that federal jurisdiction exists over all garnishments.").

D. IFC Significantly Understates The Importance Of The Issue Presented

IFC significantly understates the importance of the Third Circuit's overly broad holding, describing the issue of federal jurisdiction over Rule 69 garnishment proceedings as "relatively obscure," "seldom-litigated," and "arcane." Br. in Opp. 23. But the issue was important enough to be the subject of a certiorari grant in *Peacock*, and 11 years of litigation since *Peacock* have left the federal courts in continuing disarray. This Court's past actions, not IFC's self-serving assertions about the obscurity of the issue, should guide the certiorari decision. And it is simply untrue that the issue is seldom litigated. See Pet. 18-22 & n.4, 24-26.

In its opinion, the Third Circuit expanded the scope of ancillary jurisdiction to include all Rule 69 garnishment proceedings, contrary to this Court's precedents and decisions in other circuits. As this Court recently reiterated, the federal courts "have no warrant to expand Congress' jurisdictional grant 'by judicial decree.'" *Empire Healthcare Assurance, Inc.* v. *McVeigh*, 126 S. Ct. 2121, 2135 (2006). Thus, the Court should review this case and provide guidance on the precise scope of ancillary jurisdiction over Rule 69 garnishment proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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